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**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN**

HARSHADBHAI PATEL and DIPTI PATEL, Plaintiffs, vs.	COMPLAINT Case No.
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JANET NAPOLITANO, Secretary
of Homeland Security, MICHAEL
AYTES, Acting Deputy Director,
United States Citizenship and
Immigration Services, F. GERARD
HEINAUER, Director of the
United States Citizenship and
Immigration Services' Nebraska
Service Center and VINCENT
CLAUSEN, Detroit Field Office
Director for the Immigration and
Customs Enforcement Agency

Defendants

DESCRIPTION OF ACTION

COMPLAINT - 1

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1 1. This complaint is brought by plaintiffs HARSHADBHAI PATEL,
2 alien registration number A075 415 656, and DIPTI PATEL, alien
3 registration number A098 837 761, his wife, against the
4 Defendants to compel action on the applications for lawful
5 permanent resident status (the "applications") properly filed by both
6 the Plaintiffs with the United States Citizenship and Immigration
7 Services, and on the petition for immigrant worker (the "petition")
8 filed upon behalf of Mrs. Patel by her prospective employer, and to
9 prevent them from intentionally defaulting on their duty to
10 adjudicate HARSHADBHAI PATEL's application for adjustment of
11 status by the simple expedient of removing him from the United
12 States prior to its completion.
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18 **JURISDICTION**

19 2. This Court has jurisdiction over this action under 28 U.S.C. §
20 1331 in that it arises under the Immigration and Nationality Act,
21 the Mandamus Act and the Administrative Procedure Act, all laws
22 of the United States.
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DESCRIPTION OF PARTIES

3. The plaintiff, HARSHADBHAI PATEL, is a citizen of India, who resides in Clinton Township, Macomb County, Michigan.

4. The plaintiff, DIPTI PATEL, is a citizen of India, who resides in Clinton Township, Macomb County, Michigan.

5. The defendant, JANET NAPOLITANO, is the Secretary of Homeland Security, and resides in the District of Columbia.

6. The defendant, MICHAEL AYTES, is the Acting Deputy Director and the person in charge of the United States Citizenship and Immigration Services (the "USCIS"), the agency within the Department of Homeland Security which adjudicates applications for adjustment of status to permanent resident and petitions for immigrant workers. He resides in the District of Columbia.

7. The defendant, F. GERARD HEINAUER, is the Director of the United States Citizenship and Immigration Services' Nebraska Service Center, where the plaintiffs' applications and petition were filed. He resides in the State of Nebraska.

1 8. The defendant, VINCENT CLAUSEN, is the Detroit Field Office
2 Director for the Immigration and Customs Enforcement Agency, the
3 agency within the Department of Homeland Security that enforces
4 removal orders, and a resident of the state of Michigan.

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7 **FACTUAL NARRATIVE**
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10 9. Harshadbhai Patel arrived in the United States on August 6,
11 2001 without a visa and was initially taken into custody. However,
12 following a finding that he had a credible fear of returning to India,
13 he was paroled into the United States on August 13, 2001.

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16 10. On September 29, 2004, Guru Godad Krupa Coporation d/b/a
17 Dunkin' Donuts, filed its Petition for Alien Worker, form I-140 to
18 classify DIPTI PATEL as a skilled worker under 8 U.S.C. § 1153(b)(2)
19 with the USCIS's Nebraska Service Center (NSC). This petition was
20 assigned a file no. of LIN0426551392.
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24 11. On June 29, 2005, DIPTI PATEL filed an application for
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1 adjustment of status on form I-485 (file no. LIN052251763) with the
2 NSC, seeking to adjust her status in the U.S. to that of permanent
3 resident on the basis of the above petition.
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6 12. On January 3, 2007, HARSHADBHAI PATEL filed an application
7 for adjustment of status on form I-485 (file no. LIN0707550974)
8 with the NSC, seeking to adjust his status in the U.S. to that of
9 permanent resident under 8 U.S.C. § 1153(d), as following to join
10 his wife, DIPTI PATEL.
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14 13. This application was filed pursuant to 8 U.S.C. § 1255(i), a
15 provision of law which permitted certain foreign nationals to adjust
16 their status in the U.S., despite their lack of legal status in this
17 country, upon payment of an additional penalty fee of \$1000.
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21 14. This application was also filed pursuant to newly promulgated
22 regulations expressly intended to permit certain “arriving aliens”,
23 such as HARSHADBHAI PATEL, to apply for adjustment of status
24 with USCIS even if they were under removal proceedings or, indeed,
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1 even if they had been ordered removed from the United States. See
2 71 Fed Reg. 27585, 27591(May 12, 2006).
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5 15. This regulation was adopted by the Department of Homeland
6 Security in response to a series of judicial decisions holding that its
7 prior regulatory prohibition preventing arriving aliens in removal
8 proceedings from applying for adjustment of status was contrary to
9 the express intent of Congress in enacting 8 U.S.C. § 1255(a) to
10 permit foreign nationals such as HARSHADBHAI PATEL who were
11 paroled into the United States, from adjusting status in this
12 country. See 71 Fed Reg. 27585, 27587(May 12, 2006), *Scheerer v.*
13 *U.S. Atty. Gen.*, 445 F.3d 1311 (11th Cir. 2006); *Bona v. Gonzales*,
14 425 F.3d 663 (9th Cir. 2005); *Zheng v. Gonzales*, 422 F.3d 98 (3d Cir.
15 2005); *Succar v. Ashcroft*, 394 F.3d 8 (1st Cir. 2005).
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21 16. As of July 16, 2009, the NSC stated its processing time frame
22 for forms I-140 for skilled workers was four (4) months, and that it
23 was adjudicating employment based forms I-485 it received on
24 September 8, 2007.
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1 17. However, although a form I-140 was filed on DIPTI PATEL's
2 behalf over 4 ½ years ago, and both DIPTI PATEL and
3 HARSHADBHAI PATEL's employment based forms I-485 had been
4 filed long before September 8, 2007, still as of today no decision has
5 been made on either the form I-140 filed upon behalf of DIPTI
6 PATEL, nor her or her husband's forms I-485.
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10 18. DIPTI PATEL's application for adjustment of status cannot be
11 approved unless and until the petition for immigrant worker filed
12 upon her behalf is approved.
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14 19. HARSHADBHAI PATEL's application for adjustment of status
15 cannot be approved unless and until DIPTI PATEL's application for
16 adjustment of status is approved.
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18 20. On December 18, 2006, a final order of removal was issued by
19 the Board of Immigration Appeals against HARSHADBHAI PATEL,
20 ordering him removed under 8 U.S.C. § 1182(a)(7)(A)(i)(I) as an
21 immigrant without a valid immigrant visa or entry document.
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23 21. On July 27, 2009 HARSHADBHAI PATEL was arrested by
24 officers acting under the authority of JANET NAPOLITANO and her
25 subordinate, VINCENT CLAUSEN, pursuant to said removal order.

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1 22. HARSHADBHAI PATEL is currently being held in the custody of
2 the Calhoun County Sheriff, in Battle Creek, Michigan, facing
3 imminent removal from the United States pursuant to said removal
4 order.

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6 23. HARSHADBHAI PATEL's removal from the United States will be
7 deemed an abandonment of his application for adjustment of
8 status, resulting in a denial of the application. 8 C.F.R. §
9 245.2(a)(4)(ii)(A).

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11 24. If HARSHADBHAI PATEL is removed from the United States
12 pursuant to said order, he will be inadmissible to the United States
13 for ten (10) years. 8 U.S.C. § 1182(a)(9)(A).

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17 COUNT I

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19 25. The Defendants JANET NAPOLITANO, MICHAEL AYTES, F.
20 GERARD HEINAUER, each an officer or employee of the United
21 States, each owe a duty to HARSHABHAI PATEL and DIPTI PATEL
22 to adjudicate their applications for adjustment of status within a
23 reasonable period of time, and to DIPTI PATEL to adjudicate the
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1 petition for immigrant worker filed upon her behalf within a
2 reasonable time. 5 U.S.C. § 555(b).
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5 26. The time in which these applications and petition have been
6 pending with defendants JANET NAPOLITANO, MICHAEL AYTES,
7 and F. GERARD HEINAUER, is well beyond that which is
8 reasonably require to adjudicate it, as evidenced by the fact that
9 they are well beyond the processing time frames publicly reported
10 by F. GERARD HEINAUER for similar applications and petitions.
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14 27. This Court has authority under 28 U.S.C. § 1361 to compel an
15 officer or employee of the United States to perform a duty owed to
16 HARSHADBHAI PATEL and DIPTI PATEL.
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19 28. This Court also has authority under 5 U.S.C. § 706(1) to compel
20 agency action unlawfully withheld or unreasonably delayed.
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23 29. A “reasonable time” under the circumstances of this petition
24 would be the later of the normal processing times for such
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1 applications and petition as announced by the agency, and a date
2 at least 30 days prior to HARSHADBHAI PATEL's removal from the
3 United States.
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5 30. WHEREFORE it is respectfully requested that the Court compel
6 defendants JANET NAPOLITANO, Secretary of Homeland Security,
7 MICHAEL AYLES, Acting Deputy Director of the United States
8 Citizenship and Immigration Services, F. GERARD HEINAUER,
9 Director, United States Citizenship and Immigration Services'
10 Nebraska Service Center to adjudicate HARSHADBHAI PATEL and
11 DIPTI PATEL's applications for adjustment of status and the
12 petition for immigrant worker filed upon DIPTI PATEL's behalf at as
13 soon as reasonably possible and, in any event, no later than 30
14 days prior to the removal of HARSHADBHAI PATEL from the United
15 States.
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21 COUNT II

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23 31. JANET NAPOLITANO, as Secretary of Homeland Security, has
24 an obligation to adjudicate all applications for adjustment of status
25 properly filed with her.

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2 32. By removing HARSHADBHAI PATEL from the United States,
3 causing his application for adjustment of status to be abandoned,
4 JANET NAPOLITANO is intentionally defaulting upon her obligation
5 to adjudicate his application for adjustment of status.
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9 33. The grant of HARSHADBHAI PATEL's application for adjustment
10 of status will render him no longer removable from the United
11 States. *Matter of Rainford*, 20 I & N Dec. 598 (BIA 1992).
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14 34. Further, JANET NAPOLITANO's removal of HARSHADBHAI
15 PATEL prior to the adjudication of his application for adjustment of
16 status would be in clear derogation of Congress's intent, as
17 manifest in the plain language of 8 U.S.C. § 1255(a)(3), that foreign
18 nationals, such as HARSHADBHAI PATEL, who are paroled into the
19 United States, should have the opportunity to apply for adjustment
20 of status in this country and, necessarily, have a decision made on
21 those applications before those applications are mooted by the
22 applicants' removal.
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1 35. WHEREFORE it is respectfully requested that this Court Order
2 JANET NAPOLITANO, Secretary of Homeland Security and all of her
3 agents and employees including, but not limited to, VINCENT
4 CLAUSEN, Detroit Field Office Director for the Immigration and
5 Customs Enforcement Agency, restrained from removing
6 HARSHADBHAI PATEL from the United States until at least thirty
7 (30) days after a final decision has been made to deny
8 HARSHADBHAI PATEL's application for adjustment of status.
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13 COUNT III
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15 36. HARSHADBHAI PATEL's removal from the United States would,
16 by virtue of causing the abandonment of his application for
17 adjustment of status, deprive this Court over jurisdiction of this
18 action in so far as it relates to Mr. Patel.
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21 37. The U.S. District Courts have the authority to "issue all writs
22 necessary or appropriate in aid of their respective jurisdictions and
23 agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).
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1 38. The All Writs Act must be “directed at conduct which, left
2 unchecked, would have had the practical effect of diminishing the
3 court's power to bring the litigation to a natural conclusion.” *ITT*
4 *Community Dev. Corp. v. Barton*, 569 F.2d 1351, 1359 (5th Cir.
5 1978)(footnote omitted).

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7 39. Since Mr. Patel’s removal would in fact eliminate any power of
8 this Court to bring this litigation to a conclusion on any basis
9 except a dismissal for mootness, the issuance of an Order by this
10 Court prohibiting Mr. Patel’s removal from the United States is
11 fully authorized by the All Writs Act.
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14 40. WHEREFORE it is respectfully requested that JANET
15 NAPOLITANO, Secretary of Homeland Security, and all of her agents
16 and employees, including, but not limited to, VINCENT CLAUSEN,
17 Detroit Field Office Director for the Immigration and Customs
18 Enforcement Agency, be ordered by this Court not to remove
19 HARSHADBHAI PATEL from the United States during the pendency
20 of this action.
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24 Respectfully submitted,

25 Dated this 30th day of July, 2009
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